Supreme Court, U.S.
FILED
JAN 12 1995
OFFICE OF THE CLERK

No. 94-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

vs.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

QUESTION PRESENTED

May a school district condition a student's participation in interscholastic athletics on that student consenting to random drug testing?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 1

Summary of argument 2

Argument 4

I

An individual can give valid consent to a government search in exchange for consideration from the government 4

A. Consent and the Fourth Amendment 5

B. *Zap* v. *United States* 7

C. Implied consent 10

D. Agreements and the bill of rights 11

II

Neither *Treasury Employees* v. *Von Raab* nor *Griffin* v. *Wisconsin* diminish the precedential value of *Zap* v. *United States* 14

III

The *Perry* v. *Sindermann* line of cases cannot be invoked to abrogate consent searches 18

IV

The requested consent is voluntary because the request is rationally related to a legitimate government purpose 25

A. Deferential standard 25

B. Satisfying standard 28

Conclusion 30

TABLE OF AUTHORITIES

Cases

Acton v. Vernonia School District 47J,
23 F. 3d 1514 (CA9 1994) 1, 2, 4, 8, 29

Asher v. Texas, 128 U. S. 129, 32 L. Ed. 368,
9 S. Ct. 1 (1888) 17

Baggett v. Bullitt, 377 U. S. 360, 12 L. Ed. 2d 377,
84 S. Ct. 1316 (1964) 20

Ballard v. United States, 329 U. S. 187, 91 L. Ed. 181,
67 S. Ct. 261 (1946) 7

Blackledge v. Allison, 431 U. S. 63, 52 L. Ed. 2d 136,
97 S. Ct. 1621 (1977) 12

Bordenkircher v. Hayes, 434 U. S. 357, 54 L. Ed. 2d 604,
98 S. Ct. 663 (1978) 13, 19

Boykin v. Alabama, 395 U. S. 238, 23 L. Ed. 2d 274,
89 S. Ct. 1709 (1969) 13

Brady v. United States, 397 U. S. 742, 25 L. Ed. 2d 747,
90 S. Ct. 1463 (1970) 12, 27

Bumper v. North Carolina, 391 U. S. 543, 20 L. Ed. 2d 797,
88 S. Ct. 1788 (1968) 27

Cafeteria Workers v. McElroy, 367 U. S. 886,
6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961) 20

Camara v. Municipal Court, 387 U. S. 523, 18 L. Ed. 2d 930,
87 S. Ct. 1727 (1967) 4, 14, 16

Cammarano v. United States, 358 U. S. 498, 3 L. Ed. 2d 462,
79 S. Ct. 524 (1959) 24

Cleburne v. Cleburne Living Center, 473 U. S. 432,
87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) 27

Connick v. Myers, 461 U. S. 138, 75 L. Ed. 2d 708,
103 S. Ct. 1684 (1983) 21, 23, 25, 26

Cramp v. Board of Public Instruction, 368 U. S. 278,
7 L. Ed. 2d 285, 82 S. Ct. 275 (1961) 20

Davis v. United States, 328 U. S. 582, 90 L. Ed. 1453,
66 S. Ct. 1256 (1946) 10

Dean Milk Co. v. Madison, 340 U. S. 349, 95 L. Ed. 329,
71 S. Ct. 295 (1951) 24

Donovan v. Dewey, 452 U. S. 594, 69 L. Ed. 2d 262,
101 S. Ct. 2534 (1981) 11

Elfbrandt v. Russell, 384 U. S. 11, 16 L. Ed. 2d 321,
86 S. Ct. 1238 (1966) 20

Ferguson v. Skrupa, 372 U. S. 726, 10 L. Ed. 2d 93,
83 S. Ct. 1028 (1963) 23

Fisher v. United States, 425 U. S. 391, 48 L. Ed. 2d 39,
96 S. Ct. 1569 (1976) 14

Graham v. Richardson, 403 U. S. 365, 29 L. Ed. 2d 534,
91 S. Ct. 1848 (1971) 20

Griffin v. Wisconsin, 483 U. S. 868, 97 L. Ed. 2d 709,
107 S. Ct. 3164 (1987) 3, 14, 17

Hill v. NCAA, 7 Cal. 4th 1, 865 P. 2d 633 (1994) 30

Hooper v. Bernalillo County Assessor, 472 U. S. 612,
86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985) 27

Illinois v. Rodriguez, 497 U. S. 177, 111 L. Ed. 2d 148,
110 S. Ct. 2793 (1990) 5, 6

Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461,
58 S. Ct. 1019 (1938) 7

Katz v. United States, 389 U. S. 347, 19 L. Ed. 2d 576,
88 S. Ct. 507 (1967) 5, 10, 11

Keyishian v. Board of Regents, 385 U. S. 589,
17 L. Ed. 2d 629, 87 S. Ct. 675 (1967) 20

Kokkonen v. Guardian Life Ins. Co., 128 L. Ed. 2d 391,
114 S. Ct. 1673 (1994) 19

Lewis v. City of New Orleans, 415 U. S. 130,
39 L. Ed. 2d 214, 94 S. Ct. 970 (1974) 24

Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937,
25 S. Ct. 539 (1905) 22

Machibroda v. United States, 368 U. S. 487, 7 L. Ed. 2d 473,
82 S. Ct. 510 (1962) 12

Maher v. Roe, 432 U. S. 464, 53 L. Ed. 2d 484,
97 S. Ct. 2376 (1977) 25

Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,
334 U. S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 (1948) . . 22

Mansell v. Mansell, 490 U. S. 581, 104 L. Ed. 2d 675,
109 S. Ct. 2023 (1989) 26

Marshall v. Barlow's Inc., 436 U. S. 307, 56 L. Ed. 2d 305,
98 S. Ct. 1816 (1978) 5, 11

McDonald v. Board of Election Comm'rs, 394 U. S. 802,
22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969) 26

New Orleans v. Dukes, 427 U. S. 297, 49 L. Ed. 2d 511,
96 S. Ct. 2513 (1976) 27

New Jersey v. T. L. O., 469 U. S. 325, 83 L. Ed. 2d 720,
105 S. Ct. 733 (1985) 28

Nollan v. California Coastal Comm'n, 483 U. S. 825,
97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987) 16, 23

People v. Mason, 5 Cal. 3d 759,
488 P. 2d 630 (1971) 9, 17

Perry v. Sindermann, 408 U. S. 593, 33 L. Ed. 2d 570,
92 S. Ct. 2694 (1972) 3, 18, 19, 20, 22, 28

Pickering v. Board of Education, 391 U. S. 563,
20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968) 20

Plyler v. Doe, 457 U. S. 202, 72 L. Ed. 2d 786,
102 S. Ct. 2382 (1982) 26

Regan v. Taxation With Representation of Wash., 461 U. S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) 21, 24

Ruckelshaus v. Monsanto Co., 467 U. S. 986, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984) 13, 16, 27

Sable Communications of California, Inc. v. FCC, 492 U. S. 115, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989) 24

Santobello v. New York, 404 U. S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971) 12

Schaill by Kross v. Tippecanoe County School Corp., 864 F. 2d 1309 (CA7 1988) 19, 29, 30

Schneckloth v. Bustamonte, 412 U. S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) 5, 6, 7, 10, 13, 28

Shapiro v. Thompson, 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969) 20

Shelton v. Tucker, 364 U. S. 479, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960) 20

Sherbert v. Verner, 374 U. S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) 22

Skinner v. Railway Labor Executives' Assn., 489 U. S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) 24

Speiser v. Randall, 357 U. S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958) 20

Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) 15

Terry v. Ohio, 392 U. S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) 5

Torcaso v. Watkins, 367 U. S. 488, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961) 20

Treasury Employees v. Von Raab, 489 U. S. 656, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989) 2, 14, 15, 16, 28, 29, 30

United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754, 67 S. Ct. 556 (1947) 20

United States v. Biswell, 406 U. S. 311, 32 L. Ed. 2d 87, 92 S. Ct. 1593 (1972) 11

United States v. Broce, 488 U. S. 563, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989) 27

United States v. Carolene Products Co., 304 U. S. 144, 82 L. Ed. 1234, 58 S. Ct. 778 (1938) 26

United States v. Chicago, M. St. P. & P. R. Co., 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159 (1931) . . 22

United States v. Martinez-Fuerte, 428 U. S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976) 24

United States v. Matlock, 415 U. S. 164, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974) 5

United States v. Moreland, 258 U. S. 433, 66 L. Ed. 700, 42 S. Ct. 368 (1922) 17

United States v. Raines, 362 U. S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960) 24

United States v. Robel, 389 U. S. 258, 19 L. Ed. 2d 508, 88 S. Ct. 419 (1967) 20

United States v. Salerno, 481 U. S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987) 24

United States v. Salvucci, 448 U. S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980) 24

United States v. Thriftmart, 429 F. 2d 1006 (CA9 1970) 6, 7

United States v. Watson, 423 U. S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976) 5, 6

University of Colorado v. Derdeyn,
863 P. 2d 929 (Colo. 1993) 19, 28

Vale v. Louisiana, 399 U. S. 30, 26 L. Ed. 2d 409,
90 S. Ct. 1969 (1970) 10

Washington v. Chrisman, 455 U. S. 1, 70 L. Ed. 2d 778,
102 S. Ct. 812 (1982) 6

Whitehill v. Elkins, 389 U. S. 54, 19 L. Ed. 2d 228,
88 S. Ct. 184 (1967) 20

Wieman v. Updegraff, 344 U. S. 183, 97 L. Ed. 216,
73 S. Ct. 215 (1952) 20

Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483,
99 L. Ed. 563, 75 S. Ct. 461 (1955) 26

Woodruff v. Parham, 8 Wall. (75 U. S.) 123,
19 L. Ed. 382 (1869) 18

Wyman v. James, 400 U. S. 309, 27 L. Ed. 2d 408,
91 S. Ct. 381 (1971) 9, 10, 15

Zap v. United States, 328 U. S. 624, 90 L. Ed. 1477,
66 S. Ct. 1277 (1946) 3, 5, 7, 8, 10, 11, 14, 19, 25

Oregon Constitution

Or. Const. art. I, § 9 2

Treatises

W. LaFave, Search and Seizure (Supp. 1995) 17

R. Rotunda & J. Nowak, Treatise on Constitutional Law
(2d ed. 1992) 27

Miscellaneous

Note, The Fourth Amendment and Housing Inspection,
77 Yale L. J. 521 (1968) 7

Restatement (Second) of Contracts (1981) 9

Sullivan, Unconstitutional Conditions,
102 Harv. L. Rev. 1415 (1989) 22

D. Yergen, The Prize (1992) 11

E. Zemper, Drug Testing in Athletics, in
Drug Testing: Issues & Options 113
(R. Coombs & L. West eds. 1991) 29, 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

vs.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit corporation organized to participate in litigation related to public order and criminal justice as it affects the public interest. The decision below needlessly expands the Fourth Amendment and hamstrings the ability of schools to combat drugs. This is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Between 1985 and 1989 teachers and administrators in Petitioner Vernonia School District noticed "a marked increase in disciplinary problems, student drug use, and the glorification of drug culture." *Acton* v. *Vernonia School District 47J*, 23

---

1. Both parties have consented to the filing of this brief.

F. 3d 1514, 1516 (CA9 1994). The athletic programs were not exempt from these changes. "Athletic coaches noted an increase in the number and severity of injuries, which they attributed to greater drug use. . . . At one wrestling meet a boy was seriously injured when he failed to perform a basic well-drilled safety maneuver. The student's hotel room smelled of marijuana when the coach later went to check on his condition." *Ibid.*

In response to the rising threat of drugs to athletics, the District adopted a policy conditioning eligibility for interscholastic sports to a student's written consent to drug testing. *Ibid.* The drug testing was done from urine samples provided by the students. *Ibid.* The tests were administered to random students on a weekly basis. *Ibid.* Boys and girls were tested in separate facilities. *Ibid.* While the student gave the sample, a faculty member of the same gender was present to monitor the process. *Id.*, at 1517. The monitor was positioned so that he or she cannot view the student's genitals. *Ibid.*

James Acton and his parents refused to consent to the search, and as a result he was not allowed to participate in interscholastic athletics. James' parents brought an action in federal court attacking the policy as a violation of the Fourth Amendment and its state counterpart, Article I, section 9 of the Oregon Constitution. *Ibid.* The District Court rejected the claim. *Ibid.* The Ninth Circuit reversed, finding a violation of both constitutional provisions. *Id.*, at 1516.

SUMMARY OF ARGUMENT

The search in the present case is justified by consent. Although this Court's most recent cases have involved consents obtained during police-citizen encounters, bargained-for consents, such as the one in the present case, are at least equally valid.

Consents obtained by bargain, where the government gets an individual's consent to search in exchange for some government consideration, are more likely to be voluntary than consents obtained during police-citizen encounters. "Contractual" consents are free from the specter of police authority, are settled at arms length, and are done with the individual's knowledge that

he does not have to submit to the searches. This is simply a higher level of volition than this Court requires for a valid consent to a search.

This Court has upheld such bargained consents. In *Zap* v. *United States*, 328 U. S. 624 (1946), this Court upheld a consent to a search that was obtained as part of a contract with the government. This contractual consent is indistinguishable from the consent in the present case. Both involve a consent to search obtained in exchange for some government consideration. *Zap* is still good law, and governs the search in the present case.

There are other situations in which consent is similarly valid. This Court has found implied consent to some searches when a business enters a field known to be heavily regulated by the government. The knowledge of heavy regulation validates the searches.

The consent in the present case is particularly valid when compared to the plea bargains routinely upheld by this Court. Plea bargains involve a contractual waiver of important trial rights in exchange for a reduced criminal charge. These bargains have been upheld even if the defendant is threatened with the possibility of a significantly greater prison term if he does not agree to the bargain. This far exceeds the relatively minor pressure to consent involved in the present case.

Neither *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989) nor *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987) diminish the validity of bargained consents. Although in theory the searches in both cases could have been upheld as consensual, there were significant factual complications that made upholding the searches under a general reasonableness approach the simpler, and therefore wiser, approach. Thus *Zap* and similar authority remain undiminished.

Nor can dictum in *Perry* v. *Sindermann*, 408 U. S. 593 (1972) invalidate the consent in the present case. *Perry*'s statement that government benefits cannot be conditioned on the waiver of constitutional rights has been limited to the First Amendment. The special conditions that justify *Perry*'s statement with respect to the First Amendment do not exist under the Fourth Amendment. As this is not a First Amendment case, *Perry* does not apply.

Upholding the search condition will not give government unlimited power to bargain away individual rights. Precedent and common sense both support the principle that any conditioning of a government benefit to the waiver of a right must be rationally related to a legitimate government interest. This standard protects individuals from arbitrary government power while allowing individuals and the government to enter into agreements free from judicial interference.

The agreement in the present case satisfies the rational basis test. Drugs pose a particular threat to the safety of interscholastic athletics, whether they are used recreationally or to enhance the athlete's performance. The School District's testing program is more than rationally related to this most important governmental interest of limiting drug use in school sports.

ARGUMENT

I. An individual can give valid consent to a government search in exchange for consideration from the government.

The present case demonstrates the wisdom of the proverb "look before you leap." In the decision below, the Ninth Circuit engaged in a confusing and ultimately incorrect analysis of the Vernonia School District's search requirement under the general reasonableness standard for searches first articulated in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). See *Acton* v. *Vernonia School District 47J*, 23 F. 3d 1514, 1521-1527 (1994). Had the Ninth Circuit looked to the issue of consent before leaping into the thicket of *Camara* and its progeny, it would have avoided much confusion and come to the proper conclusion.

Under well-established precedent, validly consented-to searches are reasonable under the Fourth Amendment. Furthermore, the government may obtain this consent from an individual in exchange for some future consideration from the government. As the proposed search in the present case is made pursuant to such consent, it is reasonable. Therefore, there is no reason to

jump into the more complex issues raised by *Camara* and its progeny.[2]

A. Consent and the Fourth Amendment.

Consent is one of the best-established means of upholding the constitutionality of a search. See, *e.g.*, *Illinois* v. *Rodriguez*, 497 U. S. 177, 181 (1990); *United States* v. *Matlock*, 415 U. S. 164, 171 (1974); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222 (1973); *Katz* v. *United States*, 389 U. S. 347, 358 (1967); *Zap* v. *United States*, 328 U. S. 582, 593-594 (1946). The validity of consensual searches is derived from the purpose behind the Fourth Amendment, protecting a person's "reasonable 'expectation of privacy' " from "unreasonable governmental intrusion." *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968) (quoting *Katz*, *supra*, 389 U. S., at 361 (Harlan, J., concurring)). If a person gives valid consent to a government search, then the intrusion is *per se* reasonable, and the search is lawful.

Recent decisions of this Court focus exclusively on consensual "police" searches.[3] Starting with *Schneckloth* v. *Bustamonte*, *supra*, this Court has explored what kind of consent is necessary for searches made pursuant to police-citizen encounters, how the police may obtain consent, and from whom they may get the consent. See, *e.g.*, *Schneckloth*, *supra*, 412 U. S., at 241 (waiver unnecessary); *United States* v. *Watson*, 423 U. S. 411, 424-425 (1976) (consent cannot be obtained through coercion); *Matlock*, *supra*, 415 U. S., at 177 (third party consent).

This Court has concentrated on these types of consent searches because of the many difficult questions they raise

---

2. If this Court determines that consent is not dispositive, then the proposed search is still valid under *Camara*, *supra*, and related cases. As *amicus* expects that Petitioner will address general reasonableness in its brief, *amicus* will refrain from briefing this point.

3. This focus is with regard to searches made pursuant to explicit consent. This Court's implied consent search decisions, however, are centered around "administrative" searches of closely regulated industries. See, *e.g.*, *Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 313 (1978). This type of search will be discussed later in this brief. See Part I C, *post*, at 10-11.

regarding the validity of consent. These police searches usually involve an initial contact between officers investigating a crime and a citizen. The encounter then evolves to the citizen consenting to a search by the officers. See, *e.g.*, *Schneckloth*, *supra*, 412 U. S., at 220; *Watson*, *supra*, 423 U. S., at 413; *Washington* v. *Chrisman*, 455 U. S. 1, 3 (1982); *Rodriguez*, *supra*, 497 U. S., at 179-180. The denial of the inevitable suppression motion leaves the appellate courts with the task of reviewing the voluntariness of the consent.

Such encounters create significant legal and factual issues. As the *Schneckloth* Court understood, where consent is the result of such police-citizen encounters, it is important to determine reliably whether the consent is given voluntarily. Thus, while recognizing that without consent searches, "the security of all would be diminished," the *Schneckloth* Court simultaneously understood that in these encounters there was "the possibility of unfair and even brutal police tactics . . . ." 412 U. S., at 225.

The Court dealt with this dilemma by turning to the closest parallel it could find, "those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession." *Id.*, at 223. Under these precedents, there was no "talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Id.*, at 224. Instead, the *Schneckloth* Court determined that voluntariness had to be determined from the necessarily vague "totality of the circumstances." See *id.*, at 226. This is the type of issue that this Court simply must revisit from time to time.

The fact that this Court has recently concentrated on consent searches derived from police encounters does not, however, limit the use of consent to police searches. Non-criminal searches, such as the one in the present case, are at least equally capable of being justified through consent. If anything, consent is more justifiable once the police are removed from the equation.

The non-criminal search made by an administrative official avoids the coercive power behind "the badge and the presence of armed police . . . ." *United States* v. *Thriftmart*, 429 F. 2d 1006, 1009 (CA9 1970). Because the consent is obtained in a relatively neutral setting, there is less reason to be concerned

with a consent to a routine, administrative search. See *id.*, at 1009-1010.

Yet, there are instances where the voluntariness of a consent is even more readily ascertained. Where, as in the present case, consent to a search is obtained in exchange for some government consideration, volition is more certain. The arms-length transaction involved in this type of consent eliminates fact-bound concerns such as the police abusing their authority, see *Schneckloth*, *supra*, 412 U. S., at 229, or the administrative inspector abusing his authority or exploiting the ignorance of the person to be searched. See Note, The Fourth Amendment and Housing Inspection, 77 Yale L. J. 521, 527-529 (1968). The fact that the person is consenting to the search in exchange for some government consideration demonstrates that the individual knows that it is not necessary to submit to the search; if a person does not want to submit to the search, that individual can simply forego the proposed consideration offered by the government. This intentional relinquishment of a known right is a waiver, see *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), a standard of voluntariness that exceeds what this Court requires for consent to a search. *Schneckloth*, *supra*, 412 U. S., at 241.

As the next section will demonstrate, such "contractual" consent is at the genesis of this Court's consent-to-search jurisprudence. The fact that this Court has not ruled on such a consent recently does not diminish the legitimacy of consent obtained through mutual agreement between the government and the person searched. The lack of recent decisions from this Court simply shows how straightforward and valid these consents are.

B. Zap v. United States.

In *Zap* v. *United States*, 328 U. S. 624 (1946), vacated on other grounds, 330 U. S. 800 (1947),[4] one of this Court's first consent to search cases, contractual consent to government

---

4. The order vacating *Zap* cited *Ballard* v. *United States*, 329 U. S. 187 (1946). *Zap*, *supra*, 330 U. S., at 800. *Ballard* held that women could not be systematically excluded from federal grand and petit juries. 329 U. S., at 195-196.

searches was recognized as a valid waiver of Fourth Amendment rights. Petitioner Zap, who contracted with the Navy to do experimental work on airplane wings, was convicted of filing a false claim with the government. *Id.*, at 625-626. A key piece of evidence against Petitioner was a check made out to a test pilot that Zap used to defraud expense money from the government. See *id.*, at 628.

Zap's contract with the Navy contained the following consent: " 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' " *Id.*, at 627. Invoking this condition, the government sent two Federal Bureau of Investigation agents to Zap's business posing as Navy auditors. During the audit, the agents discovered the incriminating check. *Ibid.* Zap protested the audit as soon as he found out about it, but the agents continued in spite of his protests. *Ibid.* The check was admitted at trial, and the trial court later denied Zap's motion to strike the check from the evidence as illegally obtained. *Id.*, at 628.

The *Zap* Court upheld the search because of the contractual consent. "[W]hen petitioner, *in order to obtain the Government's business*, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Ibid.* (emphasis added). This contractual consent governed the legality of the search. Since the contract allowed inspection by any authorized government agents, the fact that the inspectors worked for the F.B.I. instead of the Navy Department did not detract from the legality of the search. *Id.*, at 628-629. The consent agreement made the search reasonable.

Zap's sanction is equally applicable to the present case. The agreement between the School District and the student is an exchange of enforceable promises. The student agrees to consent to the drug testing in exchange for the District's promise to allow the student to participate in interscholastic sports, subject to other conditions of eligibility. See *Acton* v. *Vernonia School District 47J*, 23 F. 3d 1514, 1516-1517 (CA9 1994). This is a contract, "a promise or a set of promises for the breach

of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981). It is as enforceable as the consent in *Zap*, and there is neither reason nor precedent to invoke the Fourth Amendment to void this agreement.

The fact that there is no "business" interest in the present case should not prevent this Court from upholding the search under *Zap*. For example, in *People* v. *Mason*, 5 Cal. 3d 759, 765, 488 P. 2d 630, 633 (1971), the California Supreme Court invoked *Zap* to uphold probation searches. In *Mason*, defendant's grant of probation included an express condition that defendant submit to searches by his " 'Probation Officer or any law enforcement officer.' " *Id.*, 5 Cal. 3d, at 762, 488 P. 2d, at 631. Mason challenged the admission of evidence seized in a search made pursuant to this consent. "The *Zap* case is controlling here, for it upheld the validity of an *advance* waiver of Fourth Amendment rights akin to the provisions of the probation condition before us . . . .¶ Similarly, in the instant case, when defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car and house, he voluntarily waived whatever claim of privacy he might otherwise have had." *Id.*, 5 Cal. 3d, at 765-766, 488 P. 2d, at 633-634 (emphasis in original). What matters is the advance consideration and consent. Money is only one of many legitimate forms of consideration.

Although *Zap* was not mentioned, this Court applied closely analogous reasoning in *Wyman* v. *James*, 400 U. S. 309 (1971). *Wyman* dealt with a New York regulation conditioning receipt of Aid to Families with Dependent Children (AFDC) grants on the recipient's consent to home visits by social workers. See *id.*, at 310-312. The *Wyman* Court upheld this regulation against Fourth Amendment attack, holding that there was no "search . . . in the Fourth Amendment meaning of that term." *Id.*, at 317. Consent helped take the visit out of the Fourth Amendment.

> "We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. *If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely*

ceases, as the case may be. There is no entry of the home and there is no search." *Id.*, at 317-318 (emphasis added).

There is no meaningful difference between *Wyman* and *Zap*.[5] In both cases, the government conditioned an important fiscal reward on the recipient's consent to government intrusion. Whether labeled a consent search or no search at all, in both cases consent obtained in exchange for government consideration made the intrusion legal.

Time has not diminished *Zap*'s value as precedent. It has been frequently and approvingly cited by this Court with regard to consent to search. See, *e.g.*, *Katz* v. *United States*, 389 U. S. 347, 358, n. 22 (1967); *Vale* v. *Louisiana*, 399 U. S. 30, 35 (1970); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1983). This Court has not directed a hint of criticism at *Zap*, and there is no reason to do so now.

C. Implied Consent.

Zap v. *United States*, 328 U. S. 624 (1946) is not the only example of this Court accepting advance consent to searches. This Court has also implied similar consent to searches under certain situations. In *Davis* v. *United States*, 328 U. S. 582, 585 (1946), federal agents discovered that defendant was running a gasoline black market. After arresting defendant, they proceeded to search the station, obtaining some consent from defendant to open various receptacles in the station. See *id.*, at 585-587. The arrest and search were made without a warrant. *Id.*, at 585.

The search was upheld because it was consensual. Since the ration stamps were "*public* documents" the government had a right to demand to see them. *Id.*, at 593 (emphasis in original). This right to inspect lowered defendant's expectation of privacy, making defendant's consent to inspect the coupons voluntary. See *id.*, at 593-594.

5. *Wyman* also promulgated an alternative holding that even if the consent were not voluntary, the search would still be reasonable. *Id.*, at 318. This does not supplant the consent holding, but is instead based on a hypothetical assumption that the consent was invalid. See *ibid.*

Just as Davis' participation in the gasoline market in wartime reduced his expectation of privacy in the ration stamps,[6] this Court has recognized that participation in certain businesses well known to be heavily regulated can create an implied consent to some warrantless regulatory searches. Thus, when a gun dealer "chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *United States* v. *Biswell*, 406 U. S. 311, 316 (1972). Therefore, warrantless regulatory searches made under this well-known authority are reasonable. See *id.*, at 317. As this Court subsequently noted, "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz* v. *United States*, 389 U. S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has *voluntarily chosen to subject himself to a full arsenal of government regulation*." *Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 313 (1978) (emphasis added).

It is the advance notice inherent in these schemes that helps make them reasonable under the Fourth Amendment. What underlies these cases is the fact that "the owner of commercial property *cannot help but be aware* that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan* v. *Dewey*, 452 U. S. 594, 600 (1981) (emphasis added). If these entrepreneurs did not want to submit to such searches, they could simply stay out of those closely-regulated fields. Where, as in the present case, the notice is as clear, and the consent is direct, the search is even more reasonable.

D. Agreements and the Bill of Rights.

Zap v. *United States*, 328 U. S. 624 (1946) is not the only example of waiving constitutional rights by mutual agreement between an individual and the government. The plea bargain, when defendant exchanges a plea of guilty for a reduction of the

6. Davis committed his crime during World War II, 328 U. S., at 583, when war needs required heavy government regulation of the gasoline market. See D. Yergen, The Prize 377-381 (1992).

charge by the prosecution, is an "important [component] of this country's criminal justice system." *Blackledge* v. *Allison*, 431 U. S. 63, 73 (1977). It involves a particularly important set of interests: the criminal defendant's trial rights and the prosecution's essential function of charging crimes. The importance of these interests initially raised grave concerns with the courts over the voluntariness of bargained guilty pleas. Cf. *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void").

Over time, this Court came to recognize that even agreements of this gravity were voluntary. Since both the prosecution and defense have something to gain from the plea bargain, "[i]t is this *mutuality of advantage*" that explains the prevalence and acceptability of these agreements to waive rights. See *Brady* v. *United States*, 397 U. S. 742, 752 (1970) (emphasis added). This mutual advantage meant that a plea motivated by a risk of a higher sentence if the case went to trial was still voluntary. *Id.*, at 751.

Like the consent in *Zap* and the present case, the plea bargain is contractual in nature. As noted in *Brady*, it is an agreement grounded in mutual advantage. Furthermore, the promises are enforceable against each side. If the defendant does not plead guilty, then he will go to trial on the higher charges. If the prosecution breaks the bargain, then the court will give redress to the defendant. See *Santobello* v. *New York*, 404 U. S. 257, 262 (1971). "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the *breach of agreement* was inadvertent does not lessen its impact." *Ibid.* (emphasis added). If parties could not contract with the government with regard to constitutional rights, then plea bargains simply could not stand. Their continued existence is testimony to the strength of these types of consents first sanctioned in *Zap*.

Any argument based on the fear that the government may use its power to improperly contract away the Bill of Rights must contend with the fact of plea bargaining. Even though the government may obtain a guilty plea because of the threat of prosecution on a higher charge, the plea is still voluntary.

> "Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978).

Since this type of decision meets the voluntary and intelligent waiver standard required for guilty pleas, see *Boykin* v. *Alabama*, 395 U. S. 238, 242-243 (1969), similar agreements would also meet the lower voluntariness standard of Fourth Amendment consent. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 248-249 (1973).

Mutually beneficial consents are found elsewhere in this Court's constitutional precedents. In *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), federal law required pesticide developers to include trade secrets among the data they submitted to the EPA to allow the agency to determine whether the pesticide was safe enough to market. *Id.*, at 995-996. This information could be used by the EPA to evaluate other companies' pesticides. *Id.*, at 1006. Consent made certain that prospective application of this scheme did not constitute a taking under the Fifth Amendment.

> "Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, *a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.*" *Id.*, at 1007 (emphasis added).[7]

In *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), this Court determined the necessary consent to search by analogizing to the self-incrimination provision of the Fifth Amendment. See *id.*, at 224-225. "The Court has held repeatedly that the Fifth

---

7. When the pesticide developers had reason to believe that the trade secrets they submitted would be kept secret, use of this information to benefit others would constitute a taking. See *id.*, at 1011.

Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher* v. *United States*, 425 U. S. 391, 397 (1976). If guilty pleas satisfy the compulsion standard, there is no reason for the much less coercive consent requested in the present case.

The consent requested in the present case is even more clearly voluntary than guilty pleas that are routinely accepted in American courts. The threat of withholding participation in athletic programs, while significant, is just not as persuasive as the raw state power invoked to obtain plea bargains. In *Bordenkircher* the prosecution threatened to charge defendant with a crime carrying a life sentence if he did not " 'save the court the inconvenience and necessity of a trial' " and plead guilty to a crime carrying a sentence of 2 to 10 years. 434 U. S., at 358. When defendant refused to accept the bargain, the prosecutor carried out his threat, and defendant was convicted and received a life sentence. *Id.*, at 359. This Court upheld the sentence, allowing prosecutors to present defendants with such "unpleasant alternatives . . . ." *Id.*, at 365.

The threat upheld in *Bordenkircher* is simply a much greater inducement to waive one's rights than the specter of not making the football team. Interscholastic sports are at best of secondary importance to the school system. Education, not competitive sports, is what schools are about. The bargain struck between students and Vernonia School District is mutually beneficial and rational. See Part IV B, *post*, at 28-30. There is no reason for the courts to interfere with it.

II. Neither *Treasury Employees* v. *Von Raab* nor *Griffin* v. *Wisconsin* diminish the precedential value of *Zap* v. *United States*.

In two relatively recent decisions, *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989) and *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), a bargained-for consent to search may have existed, but was not invoked to uphold the searches. In each case, this Court used the general reasonableness analysis first developed in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). The fact that *Zap* v. *United States*, 328 U. S. 624 (1946),

Wyman v. *James*, 400 U. S. 309 (1971), or other consent cases did not govern the searches does not diminish their value as precedent. In *Treasury Employees* and *Griffin*, this Court took the simpler and more extensively argued path to upholding the searches. It did not intend to diminish *Zap* or similar authority.

Treasury Employees involved regulations requiring employees of the Customs Service seeking transfer or promotion to certain sensitive positions to submit to a drug test. See 489 U. S., at 660-662. Any employee who tested positive and offered no satisfactory explanation was subject to dismissal. *Id.*, at 663. Applying *Camara* and its progeny, see *id.*, at 667, the *Treasury Employees* Court found most of the search policy to be reasonable under the Fourth Amendment. See *id.*, at 678-679.

Because the employees only had to submit to the search in exchange for eligibility for promotion or transfer, consent was theoretically available to justify the search. The facts of *Treasury Employees*, however, made the issue of consent complex and difficult. The inherent problems with consent in *Treasury Employees* made general reasonableness the easier and therefore logical path to take.

Most of the employees who were subject to the search condition entered the Customs Service before the search policy was in place. When these career employees joined the Customs Service they had no reason to believe that subsequent promotion or transfer would be conditioned on submitting to drug tests; they never had the opportunity to consent until after they had started a career with the Customs Service. The *ex post facto* nature of the search condition makes the issue of consent significantly more complicated.

If this Court had found that consent was only valid for new employees, the *Treasury Employees* decision would have created two classes of employees: "veterans" who were not subject to the search condition and new employees whose career paths would require them to submit to the searches. By upholding the searches under a general reasonableness analysis, the *Treasury Employees* Court avoided unnecessary complication. This follows the Court's practice of disposing of claims on the simplest grounds available. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) ("If it is easier to dispose of an ineffec-

tiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed").[8]

This explains *Treasury Employees*' single, tangential reference to consent: "Indeed, these procedures significantly minimize the program's intrusion on privacy interests. Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions." 489 U. S., at 672, n. 2. This footnote makes no mention of *Zap* and only refers to the portion of *Wyman* not relying on consent. See *ibid*. Such bare reference does not diminish the importance of consent, but instead reflects the decision of the *Treasury Employees* Court to take the simpler path available through *Camara* and its progeny.[9]

---

8. The *Treasury Employees* Court did not dispose of all claims. One class of positions subject to testing was where the employee was likely to get access to classified information. *Treasury Employees*, *supra*, 489 U. S., at 677. The Court remanded the case back to the Fifth Circuit to determine whether all of the positions placed in this category actually were "likely to gain access to sensitive information." *Id.*, at 678. Even if this Court had adopted a consent analysis, this remand would still be necessary. Conditioning a benefit on the waiver of a right must at least be rationally related to a legitimate government purpose. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1007 (1984). A condition that cannot satisfy the purpose it is supposed to advance does not satisfy the rational basis test. See *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 837 (1987). Thus a search condition for a position that in fact did not have any access to classified information would not satisfy the test. Therefore, regardless of the path chosen to affirm the searches, a limited remand was inevitable.

9. This does not mean that *Camara*'s reasonableness standard is necessarily easier to determine than consent. In the present case, students who try out for interscholastic athletics do not have the settled expectations that were present in *Treasury Employees*. Once this complication is removed, consent becomes considerably less difficult, requiring only some express consent in exchange for government consideration and that the bargain be rationally related to a legitimate government interest. See Part IV A, *post*, at 25-28. Satisfying this standard is likely to be much more straightforward than the balancing of interests required by *Camara*. See *Camara*, *supra*, 387 U. S., at 536-537.

If this Court wishes to weaken or abrogate one of its decisions, it usually will do so expressly. Implicit overruling of an unmentioned opinion is both rare and difficult. If a decision is in unquestioned conflict with an older case, then the older case is overruled, even if it is not mentioned in the later decision. See *Asher* v. *Texas*, 128 U. S. 129, 132 (1888). *Treasury Employees* is not in conflict with *Zap* or other consent cases, but instead simply chose an alternative path to uphold the regulations. If a decision is not mentioned in a later case, the natural inclination is to presume that the later did not overrule the earlier decision. "[A] case is not overruled by an omission to mention it." *United States* v. *Moreland*, 258 U. S. 433, 436 (1922).

Similar reasoning keeps *Griffin* v. *Wisconsin*, *supra*, from diminishing the consent cases. Griffin had been convicted and placed on probation in September of 1980. *Griffin*, *supra*, 487 U. S., at 870. One year later, the Wisconsin Department of Health Services promulgated a regulation allowing warrantless searches of a probationer's home so long as there were " 'reasonable grounds' to believe the presence of contraband . . . ." *Id.*, at 870-871. This Court, choosing not to "embrace a new principle of law," upheld a search made pursuant to this regulation as a reasonable regulatory search. *Id.*, at 872-873.

Some jurisdictions have upheld searches pursuant to probation conditions as consensual searches that are valid under *Zap*. See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d 759, 765-766, 488 P. 2d 630, 633 (1971). The fact that this Court did not rely upon consent to uphold the search in *Griffin*, does not, contrary to the assertions of some commentators, undermine these probation search cases or *Zap*. Cf. 4 W. LaFave, Search and Seizure § 10.10, at 24, n. 42.1 (Supp. 1995). *Griffin* involves a retroactively imposed regulation. Since Griffin was already on probation when the search regulation was promulgated, he had no real opportunity to consent to the search. By contrast, the probation condition upheld in *Mason* was a specific part of defendant's grant of probation. *Mason*, *supra*, 5 Cal. 3d, at 762, 488 P. 2d, at 631. Indeed, Mason even knew he was subject to the search condition. *Ibid*. "The *Zap* case is controlling here, for it upheld the validity of an *advance* waiver of Fourth Amendment rights akin to the provisions of the probation condition before us . . . ." *Id.*, 5 Cal. 3d, at 765, 488 P. 2d, at 633 (emphasis in original).

Consent is irrelevant when there was no opportunity to give it, as was the case in *Griffin*.

It is no surprise that the *Griffin* Court does not discuss consent. The lack of actual consent was simply a given. The unimportance of consent to *Griffin* is also demonstrated by the parties' treatment of the issue. The only mention of consent was petitioner's bare assertion that the search was not consented to. See Brief for Petitioner in *Griffin* v. *Wisconsin*, O. T. 1986, No. 86-5324, pp. 11-13. Neither *Zap* nor consent was used by respondent or the United States to justify the search. See Brief for Respondent in *Griffin* v. *Wisconsin*, O. T. 1986, No. 86-5324, pp. iv-vi, 9-11; Brief for the United States as *Amicus Curiae* in *Griffin* v. *Wisconsin*, O. T. 1986, 86-5324, at pp. iii-v, 5-7. "We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made." *Woodruff* v. *Parham*, 8 Wall. 123, 138 (1869). *Zap*, and the form of consent it addresses, was not in this Court's mind in either *Treasury Employees* or *Griffin*. It remains valid to this day.

III. The *Perry* v. *Sindermann* line of cases cannot be invoked to abrogate consent searches.

In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), this Court formulated a dictum that should not be allowed to govern the present case. The *Perry* Court was confronted with a claim by a nontenured junior college teacher that his contract was not renewed because he publicly criticized his superiors. This failure to renew was claimed to violate his First Amendment rights. *Id.*, at 595. The District Court held that his lack of tenure was dispositive and granted summary judgment for the junior college. *Id.*, at 595-596. The Court of Appeals reversed the District Court, *ibid.*, and this Court affirmed.

In holding that Sindermann's lack of tenure did not bar his First Amendment claim, the *Perry* Court made the following pronouncement:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.*, at 597.

To the extent that it goes beyond the First Amendment, this statement is dictum. *Perry* was a First Amendment case—whether the government benefits doctrine applied beyond the First Amendment was not an issue. Unfortunately, this dictum has been improperly expanded and invoked by some authorities to dispense with consent as a ground for authorizing searches like the one in the present case. See *Schaill by Kross* v. *Tippecanoe County School Corp.*, 864 F. 2d 1309, 1312-1313 (CA7 1988); *University of Colorado* v. *Derdeyn*, 863 P. 2d 929, 947 (Colo. 1993). These cases fail to recognize that *Perry* and related cases are limited to the withdrawal of governmental benefits in order to punish the exercise of *First Amendment* rights. As the present case does not involve an attempt by the government to purchase an individual's First Amendment rights, *Perry* and its ilk do not apply.

Any indication from *Perry* that the government may not condition the receipt of a government benefit upon the waiver of *any* government right is contrary to this Court's precedents. Plea bargains involve the conditioning of a very important government favor, reducing charges, in exchange for waiving a variety of trial rights. See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978); *ante*, at 12. Similarly, in *Zap* v. *United States*, 328 U. S. 624, 628 (1946), this Court upheld the government conditioning doing business with it on a contractor's waiver of Fourth Amendment rights. See Part I B, *ante*, at 7-10. Neither *Perry* nor any other of this Court's decisions have invalidated such consents under the *Perry* dictum. Unless this Court is in the business of making major revisions of constitutional doctrine on the sly, there must be some limit to the *Perry* dictum. "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co.*, 128 L. Ed. 2d 391, 397, 114 S. Ct. 1673, 1676 (1994).

The limit of this dictum is shown in *Perry*. *Perry* was a First Amendment case dealing with an alleged denial of employment because of the employee's exercise of his free speech rights. As

the *Perry* Court recognized, the First Amendment was at the heart of the denial of government benefits doctrine. Thus, the *Perry* doctrine was "especially" concerned with protecting the employee's "interest in freedom of speech." *Perry*, *supra*, 408 U. S., at 597.

The First Amendment limits of *Perry* are further reinforced by the authorities it cites. It noted that denying benefits because of the exercise of First Amendment rights "would allow the government to 'produce a result which [it] could not command directly.' " *Ibid.* (citing *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)). The *Perry* Court then noted that "[w]e have applied this general principle" to the denial of various monetary benefits, citing numerous cases. See 408 U. S., at 597.

None of the authorities cited by *Perry* involved denying a government benefit for the exercise of a right outside the First Amendment. Several cases cited by *Perry* did not involve conditioning benefits, but instead involved unconditional actions that were themselves unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969) (one-year residence requirement for welfare payments violates equal protection); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971) (denial of welfare to aliens violates equal protection); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 887-889, 899 (1961) (denial of cook's access to military installation did not violate due process); *Speiser*, *supra*, 357 U. S., at 529 (improper placement of burden of proof of loyalty necessary for tax exemption violated due process). The remaining cases cited by *Perry* involved First Amendment rights. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947) (speech); *Wieman* v. *Updegraff*, 344 U. S. 183, 191 (1952) (association); *Shelton* v. *Tucker*, 364 U. S. 479, 490 (1960) (association); *Torcaso* v. *Watkins*, 367 U. S. 488, 494-496 (1961) (Establishment Clause); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287-288 (1961) (speech); *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964) (speech); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966) (association); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 609 (1967) (association); *Whitehill* v. *Elkins*, 389 U. S. 54, 59-62 (1967) (First Amendment generally); *United States* v. *Robel*, 389 U. S. 258, 267-268 (1967) (same); *Pickering* v. *Board of Education*, 391 U. S. 563, 574-575 (1968) (speech). See *Perry*, *supra*, 408 U. S., at 597.

Perry had no support to extend its reach beyond the First Amendment.

Other decisions reinforce the First Amendment limits on *Perry*. Although this Court made a similarly expansive statement in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983),[10] the only authority it cites to support this claim is *Perry*, a First Amendment case. See *id.*, at 545. Furthermore, *Taxation With Representation* is itself a First Amendment case, where this Court held that there was no First Amendment right to require Congress to give tax-exempt status to non-profit organizations that engaged in lobbying. See *ibid.* Any implication that *Perry* extends beyond the First Amendment is dictum.

Other decisions demonstrate the First Amendment limits of *Perry* more directly. In *Connick* v. *Myers*, 461 U. S. 138 (1983), this Court traced the development of the rights of public employees. It noted that initially, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*, at 143. The *Connick* Court then traced the history of the public employee rights cases, see *id.*, at 144, and came to the following conclusion. "In *all* of these cases, the precedents in which *Pickering* [v. *Board of Education*, 391 U. S. 563 (1968)] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees *to participate in public affairs*." 461 U. S., at 144-145 (emphasis added). *Perry*, one of *Pickering*'s "progeny" *id.*, at 143, stands for the principle that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.*, at 142. This is the proper limit of *Perry*.

The limits on *Perry* were in place even before that decision was written. An integral part of *Perry* was the rule that whether a benefit was a right or privilege was irrelevant to what conditions the government could place on the exercise of the benefit. As *Perry* noted, "respondent's lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech

---

10. "The government may not deny a benefit to a person because he exercises a constitutional right." 461 U. S., at 545.

claim." 408 U. S., at 597-598. The precedent that discredited the right-privilege distinction was grounded in the First Amendment.

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that *the liberties of religion and expression* may be infringed by the denial of or placing conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U. S. 398, 408 (1963) (emphasis added).

In a dim, discredited part of this Court's past, some decisions applied the unconstitutional conditions doctrine outside the First Amendment. These cases reached their apex in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 282 U. S. 311 (1931), which stated, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.*, at 328-329. This rule was fashioned to protect the substantive due process doctrine typified by the discredited *Lochner* v. *New York*, 198 U. S. 45 (1905). See Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1416 (1989). It "was invented by a laissez-faire Court bent on dismantling progressive legislation that reduced the liberty of corporations . . . ." *Id.*, at 1505.

Unless this Court is willing to return to "Mr. Herbert Spencer's Social Statics," *Lochner*, *supra*, 198 U. S., at 75 (Holmes, J., dissenting), these decisions have no relevance to modern cases. *Chicago, M. St. P. & P. R. Co.* and its antecedents "produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism *foredoomed to reversal*." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230, n. 9 (1948) (emphasis added). The rights these decisions sought to protect are no longer the law, and their legal philosophy has been thoroughly discredited by this Court.

See *Ferguson* v. *Skrupa*, 372 U. S. 726, 731-732 (1963). They are no longer valid, and cannot be applied to the present case.[11]

There are good reasons for this Court's decision to limit this doctrine to the First Amendment. The First Amendment protects a particularly important and fragile set of rights. In the public employment cases,

> "[t]he issue was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.' The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)." *Connick*, *supra*, 461 U. S., at 145.

The special needs of the First Amendment are found elsewhere also. The doctrine of overbreadth, for example, gives claimants who are not engaged in constitutionally protected

---

11. Nor can *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987) be invoked to extend the government benefits doctrine beyond the First Amendment, despite the assertions of some. Cf. Sullivan, *supra*, 102 Harv. L. Rev., at 1463. In *Nollan*, the California Coastal Commission conditioned its permission to allow Nollan to build on his property on granting a public easement through his property. *Id.*, at 828. The Court found that this was a taking. *Id.*, at 837. It also found that this was not a government benefits decision, holding that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'government benefit.' " *Id.*, at 833-834.

conduct the standing to attack a statute on the ground that it may violate the First Amendment rights of others not before the Court. See, *e.g.*, *Lewis* v. *City of New Orleans*, 415 U. S. 130, 133-134 (1974). This doctrine, which is limited to the First Amendment, see *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), contrasts with the general rule of standing in constitutional cases that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960). Fourth Amendment claims, such as the claim in the present case, are subject to this usual rule of standing. The exclusionary rule is limited "to defendants who have been subjected to a violation of their Fourth Amendment rights." *United States* v. *Salvucci*, 448 U. S. 83, 95 (1980).

Another example of the special needs of the First Amendment is found in the rule that the government may only regulate the content of protected speech if it uses "the least restrictive means" of advancing a compelling interest. See, *e.g.*, *Sable Communications of California, Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). Although a least restrictive means test is invoked in a few other constitutional areas, see, *e.g.*, *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951) (state regulations affecting interstate commerce), it does not apply in Fourth Amendment cases. See, *e.g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 629, n. 9 (1989); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556-557, n. 12 (1976).

The *Perry* dictum should be similarly limited to the First Amendment. It deals with an important but limited concern—the ability of the government to use its resources to "buy" the suppression of unwanted speech, beliefs, or associations. This focus is most vividly demonstrated in the area of subsidies. In *Taxation With Representation*, *supra*, this Court upheld tax regulations denying tax exemptions to organizations that engaged in lobbying. The basis of the decision was that government was free to give and withdraw subsidies so long as the action is "not '"aimed at the suppression of dangerous ideas"' . . . ." *Taxation With Representation*, *supra*, 461 U. S., at 550 (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959)).

Outside of the suppression of ideas, the government's " 'power to encourage actions deemed to be in the public interest is necessarily far broader.' " 461 U. S., at 550 (quoting *Maher* v. *Roe*, 432 U. S. 464, 476 (1977)).

Similar considerations motivate the *Perry* line. Not all First Amendment activity is beyond the power of the government's purse. The primary purpose of the government employee cases was the protection of a core First Amendment right, "speech on matters of public concern." *Connick*, *supra*, 461 U. S., at 145. The limits of *Perry* are not beyond, but are instead within, the First Amendment. So long as it does not suppress ideas, the government may place conditions on "benefits."

> "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, *government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary* in the name of the First Amendment." *Id.*, at 146 (emphasis added, footnote omitted).

The Fourth Amendment does not deal with the suppression of ideas and therefore should not be subject to the *Perry* dictum. Whatever may be the actual scope of *Perry*, "its antecedents, and its progeny," these decisions are irrelevant to the present case.

IV. The requested consent is voluntary because the request is rationally related to a legitimate government purpose.

A. Deferential Standard.

When this Court approved contractual consents in *Zap* v. *United States*, 328 U. S. 624 (1946), it placed no concrete limits on the government's ability to obtain consent to searches through mutual consideration. The closest it came to placing any limits on the government's bargaining power was the somewhat cryptic statement "[w]hatever may be the limits of that power of inspection, they were not transcended here." *Id.*, at 628.

This should not be used to attack *Zap* as an overly broad grant of government power. *Zap* does not stand for the proposition that the government has unfettered power to bargain for constitutional rights. There are some limits to the bargains the government can obtain from individuals. But these limits are very narrow and must be carefully circumscribed. As the consent requested in the present case does not exceed these limits, the School District's consent requirement is constitutional under *Zap*.

One limit on the government's bargaining power has been discussed earlier, although it is inapplicable to the present case. As the government benefits decisions demonstrate, the First Amendment prohibits government from "purchasing" the suppression of ideas through its power to bargain with individuals. See Part III, *ante*, at 18-25.

If, as in the present case, core First Amendment values are not threatened, then the government has much more freedom to bargain. See *Connick* v. *Meyers*, 461 U. S. 138, 146 (1983). This deference stems from the principle that the courts should not second-guess the correctness of government policies. See *Mansell* v. *Mansell*, 490 U. S. 581, 594 (1989). This embodies the simple wisdom that for the most part government should be able to conduct its daily business "without intrusive oversight by the judiciary . . . ." *Connick*, *supra*, 461 U. S., at 146.

There are many fields in which this Court has determined that the Constitution must play a small role in restraining government action. An excellent example of this is this Court's review of legislation under the Equal Protection Clause and substantive due process. Beginning with the landmark decision *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153 (1938), this Court has upheld economic and social welfare legislation that did not involve a suspect classification, or the abridgment of a fundamental right, if the legislation is rationally related to a legitimate government interest. See, *e.g.*, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 491 (1955); *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 808-809 (1969); *Plyler* v. *Doe*, 457 U. S. 202, 216 (1982). This low level of scrutiny is borne out of deference to government action in those areas that do not pose a distinct threat to crucial constitutionally protected interests. "[T]he judiciary may

not sit as a superlegislature to judge the wisdom or desirability of legislature policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976).

The rational basis test allows the government its necessary freedom of action, while maintaining some check on its power. While it is rare for legislation to fail this test, see 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 15.4, at 411 (2d ed. 1992), the rational basis test does have teeth. See, *e.g.*, *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 450 (1985); *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 622 (1985). Most of the time, however, the government is able to conduct its affairs free of judicial intrusion.

Similar deference should be extended to consent-to-search bargains. This Court traditionally defers to the parties' judgment in reviewing agreements between an individual and the government. Thus, this Court will not vacate a guilty plea simply because the defendant, in negotiating the plea, "made a strategic miscalculation," and negotiated a bad deal. See *United States* v. *Broce*, 488 U. S. 563, 571-572 (1989). Barring involuntariness or misrepresentation, the courts will not vacate these important agreements. See *id.*, at 572. Evaluating bargains with the government under the rational basis test is consistent with prior practice. In *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), this Court allowed the federal government to condition the economic advantages of its approving pesticides on the pesticide maker giving up certain trade secrets. See *id.*, at 1007. This agreement was valid so long as "the conditions are rationally related to a legitimate Government interest." *Ibid.* So long as the conditions are not arbitrary, there is no fear that the government is imposing its will on a powerless individual.

The agreement that the Ninth Circuit voided in the present case deserves similar respect. There has been no allegation of misrepresentation or similarly "impermissible conduct by state agents." See *Brady* v. *United States*, 397 U. S. 742, 757 (1970); *Bumper* v. *North Carolina*, 391 U. S. 543, 549-550 (1968) (search pursuant to false claim that the police had a warrant cannot be consensual). The consent the School District obtains through its search condition is voluntary. Those students who sign the consent form will know that they may avoid the

search by refraining from participation in interscholastic athletics. Such knowing and intelligent waiver exceeds the voluntariness standard for consent to searches. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 241 (1973).

The only concern with this consent is that the School District used its power to exclude students from interscholastic athletics to coerce their consent. This argument is based on this Court's decision in *Perry* v. *Sindermann*, 408 U. S. 593 (1972). See, *e.g.*, *University of Colorado* v. *Derdeyn*, 863 P. 2d 929, 947-950 (Colo. 1993). Part III of this brief, which demonstrates that *Perry* is limited to the First Amendment, undermines this claim of coercion. Indeed, the very existence of plea bargains demonstrates that the government may validly condition a benefit upon the individual's waiving a right outside the First Amendment. See *ante*, at 11-13. Like plea bargains, the consent in the present case is voluntary.

The rational basis test lays to rest any remaining fears of the government abusing its power to bargain. Its substantial, but not complete, deference allows governments and individuals to reach bargains free from judicial interference while preventing truly arbitrary uses of government power. So long as the requested consent has a rational relationship to a legitimate government interest, the courts should not interfere.

B. Satisfying the Standard.

The consent to drug testing requested by the Vernonia School District is rationally related to a legitimate government interest. Drugs are one of the gravest problems facing society in general, see *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 674 (1989), and schools in particular. See *New Jersey* v. *T. L. O.*, 469 U. S. 325, 339 (1985). The problem can be particularly acute at the intersection of schools and competitive sports.

Competitive sports has its own dynamic that can, if left unchecked, encourage widespread use of dangerous, illegal drugs by the participants.

> "Historically, the primary purpose of drug testing of athletes has been to ensure fair competition by discouraging the use of performance-enhancing drugs. The essence of sport has always been competition between athletes based on their

> individually developed natural abilities, not on the basis of who can find the most effective chemicals. But in a society that is increasingly drug-conscious and has given ever-greater accolades to 'winners,' it seems inevitable that many athletes will turn to the use of drugs in order to win." E. Zemper, Drug Testing in Athletics, in Drug Testing: Issues & Options 113, 116 (R. Coombs & L. West eds. 1991).

The mixture of drugs and sports creates an additional problem. The physical nature of competitive sports creates an inherent risk of injury. A participant under the influence of drugs increases the threat of injury to all. This risk helped motivate the search condition in the present case, where marijuana intoxication was suspected of being the cause behind a wrestler seriously injuring himself during the performance of a routine maneuver. *Acton* v. *Vernonia School District 47J*, 23 F. 3d 1514, 1516 (CA9 1994). Furthermore, the competitive advantage given by some illegal drugs can only lower an athlete's resistance to the many pressures to use illegal "recreational" drugs.

Stopping this is an immensely important interest, and the drug testing is more than rationally related to its furtherance. Random drug testing, coupled with some adverse civil consequences for failing the test, is an adequate way to deter drug use. See *Treasury Employees*, *supra*, 489 U. S., at 676. The drugs the test is designed to spot, "creatinine, amphetamines, cocaine, marijuana and LSD," *Acton*, *supra*, 23 F. 3d, at 1517, pose a real threat to interscholastic athletics. A student performing under the influence of any of these substances could be a genuine physical threat to the student himself or other participants. "[T]he use of drugs present[s] a particular threat to athletes and cheerleaders. Due to alterations of mood, reduction of motor coordination and changes in the perception of pain attributable to drug use, the health and safety of athletes is particularly threatened." *Schaill by Kross* v. *Tippecanoe County School Corp.*, 864 F. 2d 1309, 1320 (CA7 1988).[12] Two of the tested drugs, cocaine and amphetamines, are performance-enhancing drugs

---

12. It is worth noting that the student in the present case, James Acton, sought to try out for football, a particularly violent sport where intoxication could be especially dangerous.

that are tested for by the International Olympic Committee. Drug Testing in Athletics, *supra*, at 117. Random testing can only make interscholastic athletics safer. The test is not arbitrary, and is thus constitutional.

Although a balancing of interests is not necessary to satisfy the rational basis test, it is worth noting that the requested testing is not particularly intrusive. The potential intrusiveness of urine tests can be minimized by such factors as advance warning, see *Treasury Employees*, *supra*, 489 U. S., at 672, n. 2, and relationships that decrease a person's expectation of privacy. The intrusiveness of the search in the present case is minimized by the considerable advance notice given to students. Furthermore, in athletics, with its communal dressing and showering, there is considerably less interest in privacy at risk. See, *e.g.*, *Hill* v. *NCAA*, 7 Cal. 4th 1, 41-42, 865 P. 2d 633, 658 (1994); *Schaill*, *supra*, 864 F. 2d, at 1318. The School District is simply asking to limit a privacy interest that is already considerably reduced.

The Ninth Circuit deprived Vernonia and its student-athletes of the benefit of this bargain. This bargain was not illusory. In exchange for a minimal intrusion of their privacy, students got in return a safer sport, with fewer pressures to use dangerous, performance-enhancing drugs. The courts have no right to break this bargain.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

January, 1995

Respectfully submitted,

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record